

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WINEPRESS PUBLISHING d/b/a
PLEASANT WORD,

Plaintiff,

v.

MARK LEVINE,

Defendant.

CASE NO. C09-593RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Defendant Mark Levine's motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. Dkt. # 18. Mr. Levine requested oral argument; Plaintiff WinePress Publishing, which does business as "Pleasant Word," did not. The court finds this motion suitable for disposition based solely on the parties' briefing and supporting evidence. For the reasons stated below, the court DENIES Mr. Levine's motion for Rule 11 sanctions.

II. BACKGROUND

The court resolved the case underlying this motion over seven months ago. A short summary of that case is as follows. Mr. Levine is the author of "The Fine Print Of Self-Publishing," which is subtitled "The Contracts & Services of 45 Self-Publishing Companies – Analyzed, Ranked & Exposed" (hereinafter "Fine Print"). Pleasant Word is one of the 45 self-publishing companies rated in Fine Print. Mr. Levine gave Pleasant

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1 Word an unfavorable “Avoid” rating in Fine Print, alleging dishonesty in Pleasant
2 Word’s disclosure of printing costs. Unsatisfied with its rating, Pleasant Word filed a
3 complaint for defamation against Mr. Levine in the King County Superior Court on April
4 1, 2009. The case was removed to this court on April 30, 2009. Dkt. # 1. Mr. Levine
5 moved for summary judgment on July 2, 2009. Dkt. # 8.

6 On November 9, 2009, this court granted Mr. Levine’s summary judgment
7 motion, dismissed Pleasant Word’s claims with prejudice, and entered judgment for Mr.
8 Levine. Dkt. # 16 (“November Order”). The court found that the statements challenged
9 as defamatory were “either factually accurate or within the scope of non-actionable
10 opinion,” and that “[i]n context, Mr. Levine’s assertions of dishonesty are not merely
11 opinions, they are opinions whose bases he fully discloses.” November Order at 8, 9. In
12 short, the court held that “[a]bsent evidence of false statements, [Pleasant Word] has no
13 recourse in law.” *Id.* at 10. The court similarly disposed of Pleasant Word’s remaining
14 claims for intentional interference with a business expectancy and depicting the business
15 in a false light. *Id.* at 11.

16 On March 25, 2010, over four months after the court entered judgment, Mr.
17 Levine filed a Rule 11 motion. Dkt. # 18. Mr. Levine contends that Pleasant Word’s
18 complaint was not well grounded in fact, that its claims were legally frivolous, and that
19 the complaint was filed for an improper purpose, namely to harass Mr. Levine and to
20 serve as a public relations tool for Pleasant Word. Mr. Levine seeks attorney’s fees and
21 costs pursuant to Rule 11(c)(4).

22 The court now turns to Mr. Levine’s motion for Rule 11 sanctions.

23 **III. ANALYSIS**

24 Rule 11 requires that claims not be brought for an improper purpose, that claims
25 be warranted by existing law or by a nonfrivolous argument for extending, modifying,
26 reversing, or establishing new law; and that factual contentions have evidentiary support
27 or will likely have such support after a reasonable opportunity for further investigation or

1 discovery. Fed. R. Civ. P. 11(b). Courts may impose sanctions on attorneys, law firms,
2 or parties in violation of the Rule. Fed. R. Civ. P. 11(c)(1). A party may move for Rule
3 11 sanctions subject to several procedural requirements:

4 A motion for sanctions must be made separately from any other motion and
5 must describe the specific conduct that allegedly violates Rule 11(b). The
6 motion must be served under Rule 5, but it must not be filed or be presented
7 to the court if the challenged paper, claim, defense, contention, or denial is
8 withdrawn or appropriately corrected within 21 days after service or within
9 another time the court sets.

10 Fed. R. Civ. P. 11(c)(2).

11 The 21-day grace period was added to Rule 11 in 1993 and is also known as the
12 Rule 11 “safe harbor.” Fed. R. Civ. P. 11 advisory committee’s note. The safe harbor
13 provision is intended to ensure that a party “will not be subject to sanctions on the basis
14 of another party’s motion unless, *after receiving the motion*, it refuses to withdraw that
15 position or to acknowledge candidly that it does not currently have evidence to support a
16 specified allegation.” *Id.* (emphasis added). The safe harbor procedures set forth in Rule
17 11 are mandatory. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001)
18 (citing *Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998)). A party moving for Rule
19 11 sanctions must give formal notice to the opposing party by motion; informal notice by
20 letter or warning does not suffice. *See Radcliffe*, 254 F.3d at 789; *Barber*, 146 F.3d at
21 710. Failure to provide the required 21-day notice precludes an award of Rule 11
22 sanctions. *Winterrowd v. Am. Gen. Annuity Ins.*, 556 F.3d 815, 826 (9th Cir. 2009).

23 Parties “cannot wait until after summary judgment to move for sanctions under
24 Rule 11.” *Barber*, 146 F.3d at 711 (citing *Ridder v. City of Springfield*, 109 F.3d 288
25 (6th Cir. 1997)). The court on its own initiative may take action under Rule 11 after
26 judgment, but the parties cannot. *Radcliffe*, 254 F.3d at 789; *Barber*, 146 F.3d at 711.

27 Here, Mr. Levine served his Rule 11 sanctions motion upon Pleasant Word’s
28 counsel at the same time he filed it with the court. Pleasant Word thus had no
opportunity to correct or withdraw the “baseless complaint” that allegedly violated Rule

1 11. Mr. Levine's failure to provide 21 days' notice as required by Rule 11's safe harbor
2 provision forecloses his opportunity to recover attorney fees and costs under Rule 11.
3 Even if, as Mr. Levine claims, Pleasant Word "intended not to accept, and would have
4 waived, the 'safe harbor' of Rule 11(c)(2)," Pleasant Word had no chance to do so
5 because it did not receive adequate notice of the Rule 11 motion.

6 Even if Mr. Levine had followed the safe harbor procedures set forth in Rule 11,
7 the court would deny the motion because it was filed months after the court had granted
8 summary judgment in Mr. Levine's favor and after the appeal deadline had passed.
9 Pleasant Word cannot now correct or withdraw the allegations at issue in this matter,
10 regardless of whether it had received 21 days' notice of Mr. Levine's motion for Rule 11
11 sanctions. Mr. Levine should have moved for sanctions before judgment was entered; he
12 cannot spring the motion on Pleasant Word after summary judgment. Indeed, nothing
13 prevented Mr. Levine from bringing this motion soon after Pleasant Word filed its
14 complaint.

15 As Mr. Levine's Rule 11 motion is procedurally flawed, it is unnecessary to
16 consider whether the motion met the substantive requirements imposed by Rule 11.
17 Pleasant Word's claims may or may not have been "baseless," but even a showing of
18 baselessness or frivolity does not save a motion that fails to follow basic procedural
19 requirements.

20 Rule 11 permits the court in appropriate circumstances to "award to the prevailing
21 party the reasonable expenses, including attorney's fees, incurred for the motion." Fed.
22 R. Civ. P. 11(c)(2). However, the appropriate remedy for a party's failure to satisfy Rule
23 11's safe harbor provision is a denial of its Rule 11 sanctions request, not imposition of
24 sanctions against it. *Holgate v. Baldwin*, 425 F.3d 671, 680 (9th Cir. 2005). The court
25 could sanction Mr. Levine for filing his motion long after judgment, but finds that
26 remedy inappropriate in this case.

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2 **IV. CONCLUSION**

3 For the reasons stated above, the court DENIES Mr. Levine's motion for Rule 11
4 sanctions (Dkt. # 18).

5 DATED this 21st day of June, 2010.

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8 The Honorable Richard A. Jones
9 United States District Judge
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